UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, Plaintiff, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-PJC **DEFENDANTS' SUPPLEMENTAL BRIEF REGARDING ALLOWANCE OF OPINION TESTIMONY BY CERTAIN EXPERT WITNESSES**

Anticipating that the State will attempt to elicit expert opinion testimony at trial from one or more of its expert witnesses for whom the State did not provide a written report or other Rule 26(a)(2)(B) disclosures, Defendants offer the following discussion of the narrow circumstances under which such an expert witness may nonetheless provide expert opinion testimony at trial. Although any specific application of this analysis will of course depend on the context and nature of the State's offer of specific expert testimony, Defendants present this submission to provide a context for Defendants' possible objections and/or requests for voir dire when and if the State seeks to offer expert opinion testimony by an expert for whom Rule 26(a)(2)(B) disclosures have not been made.

DISCUSSION

The Federal Rules of Civil Procedure each describe several classes of experts, including experts "retained or specially employed to provide expert testimony in the case," and experts "whose duties as the party's employee regularly involve giving expert testimony." Fed. R. Civ. P. 26(a)(2)(B); see also Fed. R. Civ. P. 26(b)(4) (discussing experts "retained or specially employed by another party"). In the narrow event that an expert does not satisfy either of these categories, that expert is relieved from the report and disclosure demands of Rule 26(a)(2)(B)

and may attempt to offer expert opinion testimony under Federal Rule of Evidence 702.[1] E.g., B.H. v. Gold Fields Mining Corp., 2007 U.S. Dist. LEXIS 2309, at *7 (N.D. Okla. Jan. 11, 2007) ("A party's failure to disclose the identity of an expert witness or submit an expert report requires the Court to automatically exclude expert testimony unless the violation of Rule 26(a)(2) was justified or was harmless under the circumstances. The expert report requirement does not apply if an expert is considered a 'non-retained' expert, and he may testify without submitting an expert report.") (citations omitted).

Here, the State has identified on its trial witness lists several expert witnesses for whom it has not provided Rule 26(a)(2)(B) disclosures, the majority of whom are employees of the State. Several courts within the Tenth Circuit have analyzed whether expert witnesses who were not fully disclosed under Rule 26(b)(4) – that is, did not produce an expert report – may nonetheless testify as full Rule 702 experts at trial. First, any State employee whose employment duties "regularly involve giving expert testimony," cannot, under the plain language of the Rule, qualify as a non-retained expert. See Fed. R. Civ. P. 26(a)(2)(B). Second, with respect to whether an expert was "specially employed," this Court instructs that the "critical inquiry" is "the nature of [the expert's] proposed testimony." Gold Fields Mining, 2007 U.S. Dist. LEXIS 2309, at *10 (citing Herd v. Asarco, Inc., 01-CV-0891-SEH-PJC, Order at Dkt. No. 361 (N.D. Okla.)); accord Wreath v. United States, 161 F.R.D. 448, 450 (D. Kan. 1995) ("The determinative issue is the scope of the proposed testimony."); Trejo v. Franklin, 2007 U.S. Dist. LEXIS 54970, at *5 (D. Colo. July 30, 2007) ("it is the substance of the expert's testimony, not the status of the expert, which will dictate whether a Rule 26(a)(2)(B) report will be required.")

[1] As a secondary matter, any such expert witness' challenged testimony would be subject to a Daubert analysis before it could be admitted. E.g., Goebel v. Denver & Rio Grande W. R.R., 215 F.3d 1083, 1087-89 (10th Cir. 2000).

Thus, if an employee witness strays beyond his or her personal knowledge gained in the ordinary course of his or her job duties, or reviews materials he or she would not otherwise see in the normal course, the substance and scope of the employee witness' opinions are changed. From that point forward, the witness is deemed to have been "specially employed" for purposes of the case. Thus, absent a timely expert report and disclosures, that witness cannot offer Rule 702 expert opinions. "For example, a treating physician requested to review medical records of another health care provider in order to render opinion testimony concerning the appropriateness of the care and treatment of that provider would be specially retained notwithstanding that he also happens to be the treating physician." Trejo, 2007 U.S. Dist. LEXIS 54970, at *5 (quoting Wreath, 161 F.R.D. at 450; see also Washington v. Arapahoe County Dep't of Social Servs., 197 F.R.D. 439, 442 (D. Colo. 2000) (expert report required where treating physician intends to offer expert testimony not based on his personal observations made during treatment of the patient); Kirkham v. Societe Air France, 236 F.R.D. 9, 13 (D.D.C. 2006) ("a treating physician who bases his opinion on the medical records of another physician, not just on his own examination of the patient, is required to prepare an expert report because such review indicates he is being retained in connection with the litigation.").

In B.H. v. Gold Fields Mining Corp., Chief Judge Eagan analyzed the circumstances under which an expert could offer opinions at trial without having disclosed an expert report. 2007 U.S. Dist. LEXIS 2309. The expert at issue was a professor of environmental science at the University of Oklahoma who had spent several years studying health problems associated with regional lead contamination and had engaged in a study funded by several mining companies (including the defendants in that action). Id. at *2-3. The plaintiffs offered the professor as a non-retained expert, and the Court ultimately found that while Rule 26(a)(2) did

not require him to prepare an expert report, the Court would do so in order to be able to engage in the necessary Daubert analysis regarding the methodologies underlying the opinions the professor intended to offer at trial. Id. at *14-16.

In so finding, Chief Judge Eagan described with favor the analysis performed by Magistrate Judge Cleary in the Herd litigation. In Herd, the Court excluded an expert who did not produce a report.

> The magistrate judge found that the critical inquiry was not whether plaintiffs intended to pay Dr. Needleman for his services, but the nature of Dr. Needleman's proposed testimony. **Dr. Needleman did not have personal knowledge of the facts related to plaintiffs' case, but would be testifying solely as an expert based on his studies in the Tar Creek region.**

Id. at *10 (discussing Herd, 01-CV-0891-SEH-PJC, Order at Dkt. No. 361) (emphasis added). In contrast, the professor at issue in Gold Fields Mining began his relevant research eight years before the case was filed. Id. at *11. Because the plaintiffs proved that the professor "formed his opinions in the normal course of his work," and the defendants presented no evidence that [he] routinely provides expert services as part of his work or that he reached any opinion specifically in connection with this litigation," the Court found that he was neither "retained" nor "specially employed" as an expert in that case. Id. at *11-12.

The Gold Fields Mining Court noted two additional relevant factors. First, "[a]lthough evidence that a party was not paid to testify suggests he was not retained, this fact alone is not dispositive of the issue." Id. at *11 (citing Brown v. Best Foods, 169 F.R.D. 385, 388 n.3 (N.D. Ala. 1996)). Thus, the Court should inquire as to whether the witness "received any compensation for giving an opinion in this case" or for testifying at trial. Id. at *11-12. If so, then the expert may qualify as "retained or specially employed."

Second, "[a] key factor in the Court's consideration is how plaintiffs' counsel

initially formed a relationship with the witness, such as whether the witness was asked to reach an opinion in connection with specific litigation." Id. at *11-12 (citing Kirkham, 236 F.R.D. at 12). Thus, if an expert was asked to testify to support or challenge the credibility or findings of a retained expert or otherwise to opine about the expert proof, such an expert is deemed to be "retained or specially employed" for purposes of the case. Id. at *11-12 (discussing Herd). Or, indeed, if the expert were asked to form any particular opinions with respect to the litigation, that expert must produce a timely report in order to testify at trial. See id.

This analysis applies regardless whether the expert at issue is employed by a party. E.g., id. at *12 (citing Prieto v. Malgor, 361 F.3d 1313, 1318-19 (11th Cir. 2004), for the proposition that "an employee was a retained expert [in part] because he had no personal knowledge of the facts"); Prieto, 361 F.3d at 1319 (party employee was specially employed as an expert where he "had no connection to the specific events underlying th[e] case apart from his preparation for this trial," which included reviewing documents outside the normal scope of his duties); KW Plastics v. U.S. Can Co., 199 F.R.D. 687, 689 (M.D. Ala. 2000) ("In a case such as this, in which it appears that the witness in question ... although employed by the defendant, is being called solely or principally to offer expert testimony, there is little justification for construing the rules as excusing the report requirement. Since his duties do not normally involve giving expert testimony, he may fairly be viewed as having been 'retained' or 'specially employed' for that purpose.") (quotation omitted); 3M v. Signtech USA, 177 F.R.D. 459, 460 (D. Minn. 1998) (same); cf., e.g., Duluth Lighthouse for the Blind v. C. G. Bretting Manuf. Co., 199 F.R.D. 320 (D. Minn. 2000) (basing allowance of an employee expert's undisclosed testimony on the facts that 1) he had not reviewed any materials or gained any information beyond the normal scope of

his job duties and 2) that he would not offer any opinions based on hypothetical questions).[2]

Dated: October 5, 2009.

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER & GABLE, PLLC

By: /s/ John H. Tucker

John H. Tucker, OBA #9110
Theresa Noble Hill, OBA #19119
100 W. Fifth St., Ste. 400 (74103-4287)
P.O. Box 21100
Tulsa, Oklahoma 74121-1100
Tel: (918) 582-1173
Fax: (918) 592-3390
-and-
FAEGRE & BENSON LLP
Delmar R. Ehrich
Bruce Jones
Krisann C. Kleibacker Lee
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Tel: (612) 766-7000
Fax: (612) 766-1600

Attorneys for Defendants Cargill, Inc. and Cargill Turkey Production, LLC

[2] The Western District of Oklahoma recently relied on Duluth Lighthouse to find that certain employees qualified as non-retained experts. Comanche Nation v. United States, 2008 U.S. Dist. LEXIS 68175, at *4-6 (W.D. Okla. Sept. 9, 2008). Defendants anticipate that the State may argue that Comanche Nation held broadly and simply that "a party's employee who does not regularly offer expert testimony is not required to comply with the Rule's expert report requirement." See id. at *4. Defendants submit that this particular language was inartfully drawn to sweep too broadly by omitting the "specially employed" component of Rule 26(a)(2)(B), and in this respect is neither supported by the cases cited in that order or by the myriad cases cited in this brief.

CERTIFICATE OF SERVICE

I certify that on the 5th day of October, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General — drew_edmondson@oag.state.ok.us
Kelly Hunter Burch, Assistant Attorney General — kelly_burch@oag.state.ok.us

Melvin David Riggs — driggs@riggsabney.com
Joseph P. Lennart — jlennart@riggsabney.com
Richard T. Garren — rgarren@riggsabney.com
Sharon K. Weaver — sweaver@riggsabney.com
Robert Allen Nance — rnance@riggsabney.com
Dorothy Sharon Gentry — sgentry@riggsabney.com
David P. Page — dpage@riggsabney.com
Riggs Abney Neal Turpen Orbison & Lewis, P.C.

Louis W. Bullock — lbullock@bullock-blakemore.com
Bullock, Bullock and Blakemore, PLLC

William H. Narwold — bnarwold@motleyrice.com
Frederick C. Baker — fbaker@motleyrice.com
Lee M. Heath — lheath@motleyrice.com
Elizabeth Claire Xidis — cxidis@motleyrice.com
Fidelma L Fitzpatrick — ffitzpatrick@motelyrice.com
Mathew P. Jasinski — mjasinski@motleyrice.com
Motley Rice LLC
COUNSEL FOR PLAINTIFFS

A. Diane Hammons — diane-hammons@cherokee.org
Attorney General, Cherokee Nation
Sara E. Hill — sara-hill@cherokee.org
COUNSEL FOR INTERVENER, CHEROKEE NATION

Stephen L. Jantzen — sjantzen@ryanwhaley.com
Paula M. Buchwald — pbuchwald@ryanwhaley.com
Patrick Michael Ryan — pryan@ryanwhaley.com
Ryan, Whaley & Coldiron, P.C.

Mark D. Hopson — mhopson@sidley.com
Jay Thomas Jorgensen — jjorgensen@sidley.com
Timothy K. Webster — twebster@sidley.com
Gordon D. Todd — gtodd@sidley.com
Erik J. Ives — eives@sidley.com
Cara R. Viglucci Lopez — cvigluccilopez@sidley.com
Sidley Austin LLP

L Bryan Burns — bryan.burs@tyson.com
Robert W. George — robert.george@tyson.com
Michael R. Bond — michael.bond@kutakrock.com

Erin W. Thompson erin.thompson@kutakrock.com
Dustin R. Darst dustin.dartst@kutakrock.com
Kutack Rock LLP
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

R. Thomas Lay rtl@kiralaw.com
Kerr, Irvine, Rhodes & Ables

Jennifer S. Griffin jgriffin@lathropgage.com
Lathrop & Gage, L.C.
COUNSEL FOR WILLOW BROOK FOODS, INC.

Robert P. Redemann rredemann@pmrlaw.net
William D. Perrine wperrine@pmrlaw.net
Lawrence W. Zeringue lzeringue@pmrlaw.net
David C .Senger dsenger@pmrlaw.net
Gregory A. Mueggenborg gmueggenborg@pmrlaw.net
Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders rsanders@youngwilliams.com
E. Stephen Williams steve.williams@youngwilliams.com
Young Williams P.A.
COUNSEL FOR CAL-MAINE FOODS, INC.

George W. Owens gwo@owenslawfirmpc.com
Randall E. Rose rer@owenslawfirmpc.com
The Owens Law Firm, P.C.

James M. Graves jgraves@bassettlawfirm.com
Gary V. Weeks gweeks@bassettlawfirm.com
Woody Bassett wbassett@bassettlawfirm.com
Vincent O. Chadick vchadick@bassettlawfirm.com
K. C. Dupps Tucker kctucker@bassettlawfirm.com
Bassett Law Firm
COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.

John R. Elrod jelrod@cwlaw.com
Vicki Bronson vbronson@cwlaw.com
Bruce W. Freeman bfreeman@cwlaw.com
P. Joshua Wisley jwisley@cwlaw.com
Conner & Winters, LLLP
COUNSEL FOR SIMMONS FOODS, INC.

A. Scott McDaniel smcdaniel@mhla-law.com
Nicole M. Longwell nlongwell@mhla-law.com
Philip D. Hixon phixon@mhla-law.com
Craig Mirkes cmirkes@mhla-law.com
McDaniel, Hixon, Longwell & Acord, PLLC

Sherry P. Bartley sbartley@mwsgw.com
Mitchell Williams Selig Gates & Woodyard
COUNSEL FOR PETERSON FARMS, INC.

Michael D. Graves mgraves@hallestill.com
Dale Kenyon Williams, Jr. kwilliams@hallestill.com
COUNSEL FOR CERTAIN POULTRY GROWERS

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

Thomas C. Green
Sidley Austin Brown & Wood LLP
1501 K Street NW
Washington, DC 20005
COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.

s/ John H. Tucker